



In The Matter of:

**JOSEPH A. DEAR, ASSISTANT SECRETARY OF  
OF LABOR FOR OCCUPATIONAL SAFETY AND  
HEALTH,**

**CASE NO. 96-STA-0017**

**DATE: October 30, 1996**

**PROSECUTING PARTY,**

**DAVID FERGUSON AND ROBERT WOMACK,**

**COMPLAINANTS,**

**v.**

**K & P, INC.,**

**RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>

### **FINAL DECISION AND ORDER**

The Administrative Law Judge (ALJ) submitted a Recommended Decision and Order (R. D. & O.) in this case arising under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. A. § 31105 (West 1994), finding that Respondent K & P, Inc. discriminated against Complainants David Ferguson and Robert Womack when it discharged them in retaliation for making safety complaints and for refusing assignments because of their concerns about the safety of certain trailers. R. D. & O. at 6.

Ken Pratt, who apparently is the sole proprietor of K & P, Inc., appeared *pro se* at the hearing representing K & P, Inc., cross-examined the Assistant Secretary's witnesses and filed

---

<sup>1/</sup> On April, 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations (61 Fed. Reg. 19982) implementing this reorganization were also promulgated on this date.

a post-hearing brief. In a September 24, 1996 letter to the Executive Director of the Administrative Review Board, Mr. Pratt requested a new trial, asserting for the first time that he did not have enough time to retain an attorney for the hearing. The record shows that Mr. Pratt requested a hearing on April 5, 1996 and the hearing was held on June 4, 1996. In addition, there is nothing in the record to indicate that Mr. Pratt sought a postponement of the hearing to seek an attorney. The request is denied.

Mr. Pratt also objected in his letter to the ALJ's finding that the complaint here was timely as to both Complainants. We find that the ALJ correctly applied the regulations implementing the STAA in holding that the letter from David Ferguson to Senator Nunn's office on behalf of both himself and Robert Womack meets the requirements of 29 C.F.R. § 1978.102 (1995). Mr. Pratt asserted that he was denied a fair trial because the ALJ was "up for retirement," but did not explain how that improperly affected the ALJ's impartiality. Finally, Mr. Pratt claimed his company would be bankrupted if it were required to pay over \$40,000 in back wages. The Secretary has held that a defendant seeking relief from a back pay order on the grounds that it would force the company out of business "must carry a heavy burden of showing inability to comply." *OFCCP v. Disposable Safety Wear*, 59 Fair Empl. Prac. Cases [BNA] 1597, 1600, Sec'y. Dec. Sep. 29, 1992, and cases discussed therein. K & P, Inc. has made no such showing here.

On the merits of the case, the record has been reviewed and we find there is substantial evidence in the record to support the ALJ's finding that K & P violated the STAA when it discharged Womack and Ferguson. We adopt the ALJ's R. D. & O. (copy attached).

**SO ORDERED.**

**DAVID A. O'BRIEN**  
Chair

**KARL J. SANDSTROM**  
Member

**JOYCE D. MILLER**  
Alternate Member